No. 18891

In the

United States Court of Appeals

For the Ninth Circuit

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,
Appellant,

vs.

STEWART'S DOWNTOWN MOTORS, et al.,
Appellees.

Appeal from the United States District Court for the District of Arizona

Appellant's Reply Brief

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PREFATORY NOTE

References to Appellees' Answering Brief are designated by the letters AB. Footnote references appear in the appendix.

PLAINTIFF'S EXCEPTIONS TO DEFENDANTS' STATEMENT OF THE CASE

Before responding to the authorities and arguments presented by defendants, plaintiff wishes to call the court's attention to five improper aspects of defendants' statement of the case. Rule 18(3) does not authorize defendants to state pure argument under the guise of a statement of the case, and certainly does not authorize

stating the Record inaccurately. Five such misstatements are discussed below.

First: Defendants contend that Copperstate's authority was not specifically defined (AB 2). This statement is either groundless argument or improper statement of fact. Whichever it is, it has no place in defendants' statement of the case. Paragraph 1 of the Agency Agreement grants authority to Copperstate to do certain acts and only certain acts, in clear, precise language.[1] The Agency Agreement limits authority in terms which make defendants' statement totally unjustified.

Second: In attempting to excuse themselves for failure to make the February payment on time, defendants contend:

> "At about the time the payment was due *the entire efforts* of the Stewart employees responsible for making the payment were devoted to a local United Cerebral Palsy Drive and, particularly, to staging a 'telethon' for that charity in Phoenix." (emphasis added) (AB 4)

Reference to the Record proves this statement to be inaccurate.[2] The store was not left totally untended as defendants would have the court believe. It is quite apparent from the portion of the Record footnoted that Mrs. Arnold, Mr. Stewart and Mr. Munson each had spent enough time on the job to devote the five minutes which would have been necessary to mail the February installment to plaintiff.

Secondly, the telethon preparations didn't begin until the last week in February (R. 107). If defendants had mailed the payment any time during that week, it would have been delinquent anyway.

Finally, while plaintiff and its counsel, as members of the public, are appreciative of defendants' devotion to such a worthwile cause, it affords them no excuse for failing to meet their legal obligations.

Third: Counsel then contends that, "The insurance payment was inadvertently overlooked." (AB 4) There is no citation to the Record substantiating this statement, and plaintiff's search fails to uncover any support for it. In fact, review of the Record, which demonstrates that the installments were uniformly delinquent,

gives rise to the almost inescapable inference that this particular payment was no exception to defendants' history of delinquency-by-design rather than by inadvertence.

Fourth: Counsel states that the February payment, which defendants mailed on March 19, was received on March 21; but plaintiff did nothing with regard to the account until March 23 (AB 5). The Record does not indicate when plaintiff received this payment, nor does the Record indicate whether the letter was mailed by defendants on the morning of the 19th or late at night; there is no evidence as to whether the letter was mailed at the Post Office, where pickups were made often, or at a street mailbox serviced infrequently. In any case, defendants' statement that a letter mailed on March 19 would be received on March 21 *"at the latest"* does not follow. It is much more reasonable to infer that the check was received in Baltimore, Maryland, on the 22nd or even on the 23rd. If it was received on either of these days, defendants' March payment was delinquent at the time plaintiff received the February payment.

Fifth: Defendants state that:

> "On April 13, 1962 Appellant's Phoenix office sent a letter to Appellees (received April 16) advising them that *because accidents had occurred* the company would consider the policy cancelled effective March 16." (emphasis added) (AB 6)

The evidence to which defendants refer is Exhibit 8;[3] nowhere in this letter does it state that the company asserted the cancellation "because accidents had occurred."

Defendants' policy was cancelled on March 16, 1962 by The Del Mar Company for non-payment of installments on the note with its letter to defendants under date of March 15, 1962 (Exhibit 5). This was before any accidents had occurred. Defendants' statement in this regard is an obvious and flagrant misstatement of the Record.

These inaccuracies are unbecoming a party who is asking relief from a court of equity.

THE POLICY WAS CANCELLED ON MARCH 16, 1962

At pages 9 and 10 of their brief, defendants dispute the fact that the policy was cancelled. This is an untenable position. Counsel's concession of the cancellation is plain and unambiguous. Furthermore, the cancellation is indisputably established by the evidence (Exhibits 3 and 5).

The issue with respect to the cancellation is not the *fact* of the legal cancellation, but whether or not plaintiff, by the alleged acts of its allegedly authorized agent, is equitably estopped from asserting its legal defense. Whether plaintiff is entitled to assert this cancellation is a separate question and has nothing to do with the *fact* of the cancellation. Equitable estoppel is a matter which defendants have affirmatively asserted; they have the burden of establishing it.

An argument appears at pages 10-13 of Appellees' Answering Brief which concludes with the statement, "The company was contractually bound by the promises and assurances of its *general agent.*" (emphasis added) This is an impressive conclusion, but the argument which precedes it does not accurately state the law. Defendants' conclusion regarding the powers of a general agent was extracted from the passage quoted at AB 11, from 16 Appleman, *Insurance Law and Practice,* § 8691, and the very passage quoted proves the inaccuracy of defendants' conclusion.

Appleman amplified his definition of a general agent in the paragraph which follows the one quoted by defendants.[4] Under Appleman's definition of "general agent," it is abundantly clear that a general agency cannot be created by ostensible authority. The sole question in determining Copperstate's status lies in determining whether the actual authority given to it by plaintiff created the general agency.

The only evidence contained in the Record which bears upon the question of Copperstate's actual authority is the Agency Agreement (Exhibit 2) which makes it clear that Copperstate had no authority to bind the insurer by its own contracts of insurance; all it could do was issue temporary binders. Copperstate could not

issue policies or accept risks on its own initiative. Since it did not have actual authority to do these things, it was not a general agent.

The Agency Agreement between plaintiff and Copperstate (Exhibit 2) sharply limits Copperstate's authority and creates what Appleman refers to as a mere "soliciting agency." Authority to solicit and submit applications falls far short of the discretionary power of a general agent who can, on his own initiative, bind the company to a full-term policy.

Defendants argue that Copperstate had actual authority to issue policies in its own discretion (AB 10). Again, defendants' own reference to the Record disproves their conclusion. Copperstate did not have the discretionary power entrusted to a general agent; it could "issue and deliver" a policy only after the company had authorized that specific policy to be issued and delivered.

Counsel also argues that since Copperstate was required to report to plaintiff each day stating the risks assumed, this gives rise to the inference that Copperstate was authorized to assume risks in its own discretion. This conclusion does not follow. The risks referred to are obviously binder risks and completed full-term policies which have been authorized by the company and executed by the insured.

As to the full-term policies, the Agency Agreement clearly contemplates the following procedure: First, the agent was to solicit an application from the prospective insured and submit this application to the company for approval. The company, if it chose to approve the application, would then grant the agent the authority to prepare the document. No discretion whatsoever reposed in the agent to bind the company to a full-term risk. If the insured wished to enter into the contract of insurance after the company approved the application, and in fact did enter into the contract, the agent was then obliged to notify the company that the contract had been executed.

It is clear from reading the Agency Agreement in its entirety that it was these two types of risks which were contemplated when the contract stated, "a report of risks assumed shall be made to the Company daily."

AUTHORITY TO ISSUE A TEMPORARY BINDER DOES NOT INCLUDE AUTHORITY TO REINSTATE A CANCELLED POLICY

Defendants correctly state that Copperstate had authority to issue a temporary binder contract; we have never disputed this. But binding authority does not create a general agency and it does not include authority to reinstate a cancelled policy.

Counsel next makes the point that "Whether the technical name applied to what Copperstate brought about is a 'binder' or a 'reinstatement' really has little effect upon the legal result." (AB 13) The thrust of defendants' argument is apparently that a binder is the same as a reinstatement and, since Copperstate had binding authority, it also had authority to reinstate the policy. Neither of these statements is supported by authority.

After pointing out that authority to merely bind a risk is usually possessed by a soliciting agent and that this authority does not create a general agency, Appleman comments that both law and common logic support this reasonable result. 16 Appleman, *Insurance Law and Practice*, § 8691. Since it had only the authority to issue temporary binder contracts protecting the applicant for insurance while his application was being passed upon by the comany, Copperstate's status falls squarely within the definition of a "soliciting agent." Copperstate, a soliciting agent, had no discretion which it could have exercised to bind the company to a full-term policy period.

There is a marked distinction between a binder and a reinstatement, both in law and in logic. As Appleman pointed out, almost all soliciting agents have authority to issue temporary binder contracts. But issuance of a binder is not a discretionary act on the part of the agent, while reinstatement of a cancelled policy is highly discretionary. The binder is simply a commitment which the company has authorized the agent to make, extending protection to the insured while the company exercises the necessary discretion in determining whether or not to issue a full-term policy. Since this is a time consuming process, the company has assumed the hazards of accepting the risk "sight unseen" for a very brief

period of time, using the device of the temporary binder contract. Implicit in the use of a binder contract is the conclusion that the company has withheld from the agent any discretionary power as to whether or not the risk should be accepted for a full term. That discretionary function is reserved and performed solely by the company itself.

Reinstatement, on the other hand, is unlike the binder in that it is a highly discretionary act. It involves consideration of whether a risk, which has been terminated because of its unsatisfactory nature, should be reassumed or reinstated in the light of new circumstances.

PLAINTIFF DID NOT CREATE APPARENT AUTHORITY IN COPPERSTATE TO REINSTATE THE POLICY

At pages 13 and 14 of their answering brief, defendants listed five points which allegedly justify their statement that, "Under these circumstances, the general agent's conduct bound the company." Counsel seemingly is discussing apparent authority as contrasted with actual authority. On the same pages, however, he discusses the powers of a general agent. It is quite clear from the authorities cited in this brief and even in Appellees' Answering Brief that a general agency cannot be created by apparent authority. At any rate, even if a general agency could be created by apparent authority, defendants have not demonstrated that such apparent authority existed.

Since the agent cannot create his own apparent authority and since plaintiff did nothing to create apparent authority, Copperstate had none. Plaintiff made this argument on page 16 of its opening brief, but defendants did not respond to it. It seems unnecessary, therefore, to labor the point further in this reply brief. However, we wish to point out one inaccurate statement of the law appearing at page 14 of Appellees' Answering Brief:

> "The question should be decided by an objective examination of what transpired between the company, by its agent on the one hand, and the insured on the other."

Defendants have not correctly stated the test for apparent authority. The question which requires objective examination is, what happened between the company and defendants which justified defendants in believing that Copperstate had actual authority to reinstate the policy. Defendants have not answered this question.

PLAINTIFF NEVER WAIVED CANCELLATION OF THE POLICY

While a cursory reading of the quotations extracted from the authorities cited at pages 15 through 23 of Appellees' Answering Brief may seem to support their position, a critical analysis of the cases themselves shows that some of them support plaintiff and the rest are inapplicable to the issues involved in the case at bar. Since the cases cannot be successfully divided into groups and discussed in categories, plaintiff will discuss most of them on a case-by-case basis.

Counsel quoted extensively from *Exchange Trust Co. v. Capitol Life Ins. Co.,* (D.C.N.D. Okla.) 40 F.2d 687 (1930), affirmed 49 F.2d 133 (10th Circuit 1931), and stated that it supports the proposition that Copperstate's suggestion regarding payment of the delinquent installment amounted to a reinstatement of the policy (AB 15).

Notwithstanding the language quoted by defendants, the court in *Exchange Trust* found in favor of the insurance company. The facts, which are similar to those of the case at bar, are as follows:

The insurance company had issued a policy on the life of a Mr. Johnson who paid the first annual premium. On the due date of the second premium Johnson paid the company $339.00 in cash and executed his promissory note for the balance. The note provided that if it was not paid when due, the policy would be forfeited and would become void. The note was never paid. After the due date, the wife of the insurance company's agent mailed a notice to Mr. Johnson, without the knowledge or authorization of the company, pointing out that payment on the note was past due and it would have to be made if Mr. Johnson wished to have the policy reinstated. Subsequently the company itself wrote a letter to Mr. Johnson stating that the policy had lapsed

because of non-payment of the premium note and requested Mr. Johnson to advise the company whether or not he wished the policy reinstated, and if so, the company would instruct him as to the procedure for reinstatement. Mr. Johnson asked the company for an extension of time in which to pay the note. The company replied by outlining the necessary steps for reinstating the policy. Shortly afterwards, an illness beset Mr. Johnson from which he never recovered; he had not completed the necessary steps. After Mr. Johnson's death, suit was brought on the policy. The company's defense was that the policy had lapsed for non-payment of the premium.

The portion of the opinion which defendants quoted in their answering brief sets out the well established doctrine that a contracting party cannot demand performance of the contract on the one hand and claim a breach on the other. We do not dispute the validity of that doctrine; but in the case at bar, as in *Exchange Trust*, the insurance company was not asserting such an inconsistent position.

The court in *Exchange Trust* found that the request for payment sent by the agent's wife was not an unqualified demand for payment which was binding on the insurer. The trial court also pointed out that the insurance company's conduct did not amount to a waiver of its rights.

The case was appealed from the district court of the Northern District of Oklahoma to the Circuit Court of Appeals for the Tenth Circuit and was affirmed. While the Circuit Court found that the insured had not relied on the notice, the court said that there would have been no recovery even if the insured had relied.

> "But for another all-sufficient reason the notice is unavailing to the executor, and that is it was not authorized by the company. . . . The policy itself provides that the president or other designated officers of the company shall have the sole authority to make or modify the contract . . . and that it shall not be bound by the promise or representation of any other agent or person. The notice did not purport to be and was not so authorized, and it did not bind the company." *Exchange Trust Co. v. Capitol Life Ins. Co., supra.*

Policy language similar to that involved in *Exchange Trust* is involved here.

> ". . .[n]or shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by an authorized representative of the Company." (Exhibit 1).

As must be abundantly clear at this point, plaintiff strenuously denies that Copperstate was an authorized representative of the company in the sense that term is used in declaration 16 (Exhibit 1). However, even if we concede that it was so authorized, *arguendo,* the terms of the policy have still gone unfulfilled since there was no "endorsement issued to form a part of this policy *signed* by an authorized representative" as is required by the policy. (emphasis added)

Therefore, the authority which defendants cited at page 15 of their answering brief fully supports our position in this matter. The case stands for the proposition that nothing the agent says or does can justify the insured's reliance on a course of action which is suggested by the agent if it is explicitly in conflict with the written policy.

Defendants' first quotation on page 16 is probably accurate as an abstract statement of the law, but a critical reading supports plaintiff rather than defendants. The test set out in *Beatty v. Mutual Reserve Fund Life Ass'n.,* 75 F. 65 (9th Cir. 1896), presents the two familiar methods of binding the principal, i.e., by the acts of its actually or apparently authorized agents. We do not dispute the test nor the effect on the principal if the test it met. As has been discussed elsewhere in this brief and in Appellant's Opening Brief, the test has not been met.

Counsel's reply to plaintiff's argument regarding apparent authority states in effect, that simply because plaintiff chose to deal through agents, it apparently vested its agents with authority coextensive with plaintiff's own authority. This does not follow.

It is useless to discuss apparent authority in the abstract. The crux of the matter at hand is whether or not Copperstate had apparent authority *to reinstate the policy* after the cancellation

was effected on March 16, 1962. The first step in determining this question is to look at the facts as they existed on March 19, 1962, the date defendants received the Notice of Cancellation, and to look at these facts as they were seen through the eyes of defendants. Up to this point defendants had had only one direct contact with plaintiff, this being the insurance policy itself (Exhibit 1). The matter is well settled in this state that defendants are fully charged with the knowledge of the contents and provisions of this contract. Item 18 provides that the policy may be cancelled by the named insured by mailing a written notice to the company, stating when thereafter the cancellation shall be effective. The note, signed by an authorized representative of defendants (Exhibit 3), designates Del Mar the agent of defendants for the purpose of cancelling the policy in case there is a default in payments on the note. Such cancellation was effected by defendants through their irrevocably authorized agent, Del Mar, on March 16, 1962 (Exhibit 5) as was admitted by defendants in open court (R. 100, 101).

Item 16 of the insurance contract provides that:

> "16 . . . the terms of this policy [shall not] be waived or changed, except by endorsement issued to form a part of this policy, signed by an authorized representative of the Company." (Exhibit 1)

Thus, even if Copperstate had been an authorized representative of the company, which he clearly was not, as discussed infra, page 10, there was clearly no "endorsement issued to form a part of this policy" which was signed by even an unauthorized representative of the company. *Beatty,* therefore, does not support defendants. Copperstate was not authorized to reinstate the policy, either actually or apparently.

Faris v. American Nat. Assur. Co., 44 Cal. App. 48, 185 Pac. 1035 (1919), from which defendants quote as authority for their position, is a case dealing with matters other than those involved in the case at bar. In *Faris,* the persons with whom the insured dealt had actual as opposed to apparent authority to waive the provisions of the insurance contract. Keeping this point in mind,

plaintiff will not take issue with that portion of the *Faris* case quoted by defendants at page 17 of their answering brief which states, in effect, that the principal can waive any of its rights under the contract. But in the case at bar we are not dealing with an express or implied waiver *by the principal.*

Defendants assert that our acts present a "classic case for application of the doctrine of equitable estoppel as it is understood in Arizona jurisprudence. In *Holmes v. Graves,* 83 Ariz. 174, 318 P.2d 354, 356 (1957) . . ." (AB 18) Reviewing the *Holmes* facts demonstrates that the situation there was starkly different from the case at hand.

Plaintiff, proprietor of a grocery store, brought an action against one of its customers on an open account. This customer had had a charge account at plaintiff's grocery store for a period of 4½ years during which time the following procedure was followed in keeping track of the amount owing. Each time defendant made a purchase at plaintiff's store, the amount owing from that purchase would be entered on a sales pad. The total past balance owing would appear at the top of the pad and the current purchase would be added to it. A running balance was kept in this manner. There was no itemization of the individual items purchased by the customer.

Defendant sent an interrogatory to plaintiff requesting an itemization of each single item that had been purchased during the 4½ month period prior to suit. Plaintiff was, of course, unable to present such an itemized statement since his accounts reflected only the amounts owing rather than the items themselves, even though he was required to do so by Rule 12(f), *Arizona Rules of Civil Procedure.*

The trial court denied defendant's motion to compel plaintiff to present an itemized list of these groceries. The Supreme Court affirmed the trial court's ruling saying that over the period of 4½ years defendants acquiesced in plaintiff's system of keeping the account. The court pointed out that the defense of estoppel is equitable in nature and will not be applied to obtain an unjust result.

Defendants quoted a portion of this decision which lay down the three elements of equitable estoppel.

> "First, acts [by the principal or his agent acting with actual or apparent authority] inconsistent with the claim afterwards relied on. . . ."

Once again plaintiff wishes to point out that we have never denied that the insurer *could* have waived any of its rights under the contract. Had it waived such a right, and had the other elements of estoppel been present, we could not assert that right at a later date. But even if we assume that Copperstate intended to waive the cancellation and reinstate the policy by its telephone conversation with Munson on March 19, 1962, the crucial question is whether or not Copperstate had actual or even apparent authority to waive the right on behalf of plaintiff with regard to this element. This question has been discussed at length elsewhere in this brief and in Appellant's Opening Brief.

> ". . . [S]econd, action by the adverse party on the faith of such conduct. . . ."

We assume that the court meant action *or forbearance* by this second requirement. Even so, this element requires that the forbearance of defendants be made *"on the faith"* of Copperstate's conduct. Certainly defendants could have had no faith in Copperstate's representation from the time it received Del Mar's letter stating that reinstatement would not be requested and the policy remain cancelled. This letter must necessarily have been received by defendants on March 27, 1962 (R. 44), (discussed infra, page 19) three days before the first accident occurred (R. 45). These three days afforded defendants ample time in which to place their insurance elsewhere.

> ". . . [T]hird, injury to the adverse party *resulting from* the repudiation of such conduct." [emphasis added]

This element requires that there be a causal connection between defendants' damages and plaintiff's conduct. Even if Munson's telephone conversation had been with an *actually* authorized representative of plaintiff rather than Copperstate, and even if de-

fendants indisputably relied entirely upon such representation by the authorized agent, no damages would have flowed from that representation because no accidents happened which could have been claims under the policy between the date of the telephone conversation, March 19, and March 27, the date of Del Mar's letter stating that reinstatement would not be requested and the policy remained cancelled.

The first accident occurred fully three days after defendants received Del Mar's letter of March 27, 1962. It is well known that an individual can obtain insurance coverage by binder contract in a matter of minutes with a telephone call to any of numerous insurance salesmen. Certainly the period of three days afforded defendants more than ample time to place this five-minute phone call; therefore, no damages can be said to have flowed from defendants' reliance.

Finally, even if the other three items were present, said the Arizona court, estoppel is applied only when the failure to apply it would result in an unjust and unconscionable result. The nature of the injustice and unconscionability of which the Arizona court speaks, is the situation which existed in *Holmes v. Graves, supra,* where the defendant had unequivocally acquiesced in the grocery store's method of keeping track of the account for over 4 years and then, to escape liability on a clearly just debt, asked plaintiff to comply with the letter of the law when such compliance was patently impossible.

We do not dispute defendants quotations from *Heckman v. Harris,* 66 Ariz. 360, 188 P.2d 991 (1948), and *Onekama Realty Co. v. Carothers,* 59 Ariz. 416, 129 P.2d 918 (1942) as abstract statements of the law any more than we do defendants' quotation from *Holmes v. Graves* commented upon above. The equitable estoppel doctrine unquestionably exists; it is simply inapplicable to the facts of the case at bar.

Defendants cited *Baumann v. Metropolitan Life Ins. Co.,* 144 Wisc. 206, 128 N.W. 864 (1910) as authority for their position (AB 20). This was an action on a life insurance policy by the wife of the insured. The company's defense was cancellation of

the policy pursuant to non-payment of the premium. Plaintiff, the insured's wife, went to defendant's district office in Racine, Wisconsin, and explained to a Mr. Comer, the district superintendent for defendant company, that she thought she had paid the premium before, but she was willing to pay it again in order to avoid cancellation of the policy. Mr. Comer refused to take payment of the premium at that time and explained that he would look into the matter, apparently to see if an accounting error had been made somewhere and whether it would be necessary for her to make another payment of the same premium. A week or so later she spoke to other agents of the company and again tried to urge payment upon them. They also refused to take it but promised to look into the matter. Subsequently, the policy was cancelled on the books of the corporation for non-payment of the premium. The insured died shortly thereafter.

The question which faced the jury was whether or not plaintiff had established the above recited facts by a preponderance of the evidence. There was no question that the individuals with whom plaintiff dealt were authorized by the company to make the statements which they were alleged to have made. The jury found in favor of the plaintiff and thereby impliedly found that plaintiff had sustained her burden in proving the truth of the facts recited above. The appellate court simply affirmed the judgment below on the ground that plaintiff's evidence supporting the judgment was credible and could not be disturbed on appeal. The points conceded by the insurance company in *Baumann* are the very points at issue here.

Defendants cited *Travelers Insurance Co. v. Sindle,* (D.C.W.D. Ark.) 186 F.Supp. 8 (1960) and quoted some dictum from the case. Again, plaintiff does not wish to take issue with the accuracy of the material quoted but points out that it is inapplicable to the case at bar. The court's remarks were confined to the power of a *general* agent.

Furthermore, the court made it clear that the doctrine of estoppel was not quite so ubiquitous a defense as defendants would have us believe. The doctrine of equitable estoppel cannot be

applied to *create* a contract. This is exactly what defendants are urging the court to do. The insurance contract involved in the case at bar was unqualifiedly cancelled in plain language by Del Mar's letter of March 15, 1962 (Exhibit 5).

Counsel's quotation from *Jackson v. M.F.A. Mutual Insurance Company* (D.C.W.D. Ark.) 169 F.Supp. 638 (1959) is also an accurate statement of the law which plaintiff might well have quoted in its own brief. This extract points out the evils which the equitable doctrine of estoppel is intended to cure. We agree that the doctrine should be applied ". . . when it is necessary to prevent *injustice* and *fraud* being perpetrated by insurance companies upon their policyholders. . . ." (emphasis added)

In the case at bar there has been no perpetration or imposition of fraud or injustice upon defendants. If there be such elements in this case at all, it is defendants who are attempting to play both sides of the fence. It is well to remember that cancellation of the policy which plaintiff asserts was made in unqualified terms before any loss occurred under the policy. For business reasons which do not appear in the Record, the policy was irrevocably cancelled. At law, such a cancellation is unassailable. It is adequately and conclusively demonstrated both by the evidence and by counsel's admission (R. 100, 101).

Stivers v. National American Insurance Co., 247 F.2d 921 (9th Cir. 1957), is distinguishable from the case at bar for two distinct reasons. The first is that the agent who made the representations upon which the insured relied was found by the court (without discussion) to be a *general* agent rather than a mere soliciting agent as is involved in the case at bar.

Secondly, the court made the following statement:

> "Where, as here, a general agent of the insurer undertakes to advise a policy holder as to the meaning of a provision of the policy, and what will constitute full compliance therewith, the latter is entitled to rely thereon, *unless such advice is in patent conflict with the terms of the policy.*" (emphasis added)

Thus, the insured is not entitled to rely on representations even of a *general* agent when such reliance is unreasonable under the cir-

cumstances. The "circumstance" which the court was discussing was a conflicting statement in the policy. In the case at bar, the circumstances which make it unreasonable for defendants to have relied on Copperstate's representations is not only the provisions of the policy (discussed infra, pages 10, 11) but also the fact that the policy had been unqualifiedly cancelled.

The last of the long line of cases which defendants have cited in their answering brief is *Occidental Life Insurance Company v. Jacobson,* 15 Ariz. 242, 137 Pac. 869 (1914). This is a well considered opinion by the Arizona court which held that the insurance company was estopped to assert a forfeiture of the policy for non-payment of premium. But the similarity between the *Jacobson* case and the case at bar ends there.

The insured took out a life insurance policy which provided that the annual premium of $155.50 should be paid in advance on the second day of each November. The first and second annual premiums were paid. The company accepted the insured's promissory note as the third payment. This note provided:

> "On the second day of February, 1912, without grace, I promise to pay to the order of the Occidental Life Insurance Company, of Albuquerque, N. M., at its office in Albuquerque, N.M., the sum of one hundred fifty-five and 50-100 dollars with interest at the rate of eight per cent per annum from December 2d, 1911. * * * *"

On February 6, 1912, more than two months after the note became due, the insured paid the sum of $79.80 to the insurance company on account. This payment was accepted by the company and credited to the insured. The remainder of the payment was never paid and the insured died April 11, 1912.

Under those facts it is quite clear that the company had the right to cancel the policy when the insured did not pay the note on December 2, 1911, but it did not do so. Not only did the company refrain from cancelling the policy, but it accepted partial payment on the delinquent note two months after the note was due. This was a clear waiver of the company's right to insist upon a forfeiture for delinquent payment of the note. Plaintiff has never disputed the fact that almost any right, whether inferred by law

or contract, *can* be waived, but there was no waiver in the case at bar.

The statement made by defendants at page 8 of their answering brief, to the effect that after the accidents it became apparent to plaintiff that the policy in question "wasn't such a bargain after all," is totally unjustified but might well have been leveled at the insurance company involved in the *Jacobson* case. In the case at bar the unqualified final cancellation upon which plaintiff relies was made before any accidents occurred and before the fact that the policy might be a questionable bargain came to light. In *Jacobson,* not only did the company waive their forfeiture right by accepting payment two months late, but they also continued their tolerance of the insurer's delinquency without taking any action to either enforce payment or cancel the policy until his death on April 11.

Counsel summarizes his position, at page 24 of Appellees' Answering Brief, by stating that it would be inequitable to allow plaintiff to assert the cancellation of the subject policy. Plaintiff is somewhat nonplussed at defendants' statements. Exhibit 5, which defendants admitted receiving on March 19, 1962, was an unqualified cancellation of the policy. What more was plaintiff obliged to do after the policy was cancelled? How many times do defendants believe that we should have cancelled the policy? On March 27, 1962, again before any accidents had occurred, defendants received Exhibit 6 from Del Mar which was a reaffirmance of the March 16 cancellation. Within a period of 12 days defendants received two notices of the cancellation. Both notices were received before any accidents had occurred.

DEFENDANTS RECEIVED DEL MAR'S SECOND NOTICE OF CANCELLATION ON MARCH 27

Defendants claim to have had some difficulty understanding the argument which appears at page 20-27 of Appellant's Opening Brief. Counsel states that "Appellant's attempt to demonstrate an 'office procedure' of mailing correspondence to Appellees by alluding to a few other occasions certainly is not evidence of an inflexible, routine office procedure." (AB 25)

First of all, the table which appears at page 21 of Appellant's Opening Brief establishes more than an allusion to "a few other occasions." It shows that there were six occasions on which Del Mar mailed notices of one kind or another to defendants. It shows that on all six occasions Copperstate received a copy of this correspondence to defendants. It further shows that defendants admitted receiving the original five of the six times. They claim not to have received the crucial piece, Exhibit 6.

And the Record shows more than what five or six pieces of mail would establish, standing alone. We would agree that five or six pieces of mail would not establish an invariable office procedure if there had been seven or ten or twenty pieces of mail sent by Del Mar to defendants and that, of all these pieces, Copperstate received only six of them. But that is not the case. This office procedure was shown to have been followed inflexibly, *100 per cent of the time.*

Once again, we call the court's attention to *Consolidated Motors, Inc. v. Skousen* discussed at pages 21 and 22 of Appellant's Opening Brief. Defendants have not attempted to respond to that case. The case stands as the current law in the state of Arizona and compels the conclusion that the letter was mailed to defendants.

Counsel then states,

> "But even if it did arise, such presumption or inference would quickly have disappeared with Munson's positive, direct testimony that he, the person responsible for the insurance, did *not* receive it." (AB 25, 26)

Even if the letter had been addressed to Munson rather than Stewart, counsel's statement would not be an accurate statement of the law.

> "There is a strong presumption that a letter properly addressed, stamped and deposited in the United States mail will reach the addressee, and a verdict of a jury or the finding of the court in opposition to this inference of fact, when based on no evidence of non-receipt, is certainly against the weight of the evidence." *Merchants' & Manufacturers' Association v. The First National Bank of Mesa, Arizona,* 40 Ariz. 531, 14 P.2d 717 (1932).

In the portion of Udall, *Arizona Law of Evidence,* quoted in Appellant's Opening Brief, it is stated that this presumption can even overcome evidence of non-receipt. In the case at bar, however, there was *no evidence* of non-receipt. At pages 111 and 115 of the Record, set out in full at page 24 of Appellant's Opening Brief, Mr. Munson carefully stated that *he personally* never saw the letter. In light of the fact that the letter was addressed to Spencer Stewart, it is altogether understandable that Mr. Munson feels free to testify that *he* never saw the letter. Nowhere in the Record does there appear a statement on the part of any of defendants' officers or employees that the letter was not received by Stewart's Downtown Motors, Inc.

Defendants attach significance to the fact that payments on the note were accepted after the cancellation. This is altogether consistent with the contract between the parties and the contract between defendants and Del Mar. It will be remembered that Stewart's Motors had a highly fluctuating risk which depended upon the number of cars it had in its possession and how many of them were on the road during the policy period. The price for contract of insurance was not a fixed number of dollars. It depended upon the size of the risk as reflected at the end of the policy period. The amount of the premium was to be adjusted upwards or downwards at the end of the policy period.

Plaintiff was entitled to have the agreed amount of cash from defendants as security for the payment of a premium which might very well have been substantially in excess of the estimated amount. Therefore, acceptance of the payments on the note was altogether consistent with plaintiff's legal right to this security.

Respectfully submitted,

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By ROBERT H. GREEN
BRUCE G. DEBES,

Attorneys for Appellant

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

BRUCE G. DEBES

(Appendix Follows)

Appendix

1. "The Company hereby grants authority to the Agent in the following territory, viz: Phoenix and vicinity to *solicit and submit applications* for the classes of insurance and fidelity and surety bonds for which a commission is specified in the Commission Schedule which forms a part hereof; to issue and deliver policies, bonds, certificates, endorsements and binders *which the Company may, from time to time, authorize to be issued and delivered;* to collect and receipt for premiums thereon or therefor; to cancel such policies, bonds and obligations in the descretion [sic] of the Agent where cancellation is legally possible; and to retain out of premiums collected and paid over to the Company in accordance herewith, as full compensation on business placed with the Company by or through the Agent, commissions at the rates set forth in said Commission Schedule." (emphasis added) *Agency Agreement* (Exhibit 2) Paragraph 1.

2. "A. The office was pretty confused about that time. Mrs. Arnold was General Chairman of Telethon for the United Cerebral Palsy Association, which Telethon occurred on March 3rd and 4th, and for several weeks prior to that *practically all* of *her* time, and *considerable* time of *some* of the rest of us, were devoted to that Telethon.

"Q. Did Mr. Stewart spend any time with respect to this organization?

"A. Mr. Stewart is National Vice President of United Cerebral Palsy Association, and he personally gave *much time* to this event.

"Q. Did you personally devote any time to this deal?

"A. *Some,* yes." (emphasis added) (R. 107)

3. CARBON COPY

UNITED STATES FIDELITY AND GUARANTY COMPANY
3424 NORTH CENTRAL AVENUE
PHOENIX 12, ARIZONA

April 13, 1962

Registered Mail

Stewart's et al
800 N. Central Avenue
Phoenix, Arizona

Attention: Spencer Stewart

Re: Policy No. CLP 69624

Gentlemen:

We have received notice from you regarding certain accidents that have occurred since March 17, 1962.

Our records indicate that your insurance coverage terminated for failure to pay premium as of March 16, 1962 and was not reinstated.

I am sending a copy of this letter to your agent, Copperstate Insurance Agency.

Yours truly,

/s/ Charles L. Blute

Charles L. Blute
Superintendent
Claims Department

CLB:jr
cc: Copperstate Insurance

(Exhibit 8)

4. "It is important not to reason backward in applying such a test. Thus, to take a soliciting agent who can merely solicit applications, deliver policies, or do other acts, and say brashly

that he was apparently vested with ostensible authority to bind the insurer by his contract, that the insured was justified in relying thereon, that the agent was, therefore, a general agent, and because of that had the power to bind the insurer by his contract, is a mere circumlocution of logic which would permit the court in any case desired to find a general agency. *A general agency cannot be based upon implied, apparent, or ostensible authority.* There must be *actual* authority to bind the insurer by the issuance of a policy or the completion of a contract. If such actual authority exists, the other powers of a general agent necessarily co-exist upon which the insurer can be bound in other ways. If such actual authority does not exist, the agent is not a general agent, regardless of his ostensible powers, and the insurer could be bound by his contracts of insurance only through the doctrines of waiver, estoppel, or ratification." (emphasis added) Appleman, *Insurance Law and Practice,* § 8691.